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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER GALINDO,

Defendant and Appellant.

F073856

(Kern Super. Ct. No. MF011565B)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. John S. Somers and Steven M. Katz, Judges.*

Imhoff & Associates and Shannon M. Dorvall for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Nora S. Weyl, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant/defendant Christopher Galindo, an inmate at the California Department of Corrections and Rehabilitation (CDCR), was charged with acting with two fellow inmates to assault another inmate. After a jury trial, defendant was convicted of count 1,

* Judge Somers presided over pretrial plea proceedings; Judge Katz presided over the jury trial and sentencing hearing.

assault with a deadly weapon or by any means of force likely to produce great bodily injury while confined in a state prison (Pen. Code, § 4501)¹ with a great bodily injury enhancement (§ 12022.7, subd. (a)). The court found true the allegations that defendant had two prior strike convictions and two prior serious felony enhancements. Defendant was sentenced to the third strike term of 25 years to life, plus three years for the great bodily injury enhancement and five years for the prior serious felony enhancement.

On appeal, defendant contends the court improperly admitted a silent video that showed the victim's injuries, and argues the video was testimonial hearsay and violated his constitutional right to confront and cross-examination witnesses since the victim did not testify at trial. He also argues the silent video was irrelevant and prejudicial. Defendant further argues the court abused its discretion when it denied his postverdict request to dismiss his prior strike convictions, and that the great bodily injury enhancement is not supported by substantial evidence. Defendant's issues are without merit.

After further briefing, the parties agree the matter must be remanded for the trial court to determine whether to exercise its discretion to dismiss the prior serious felony enhancement pursuant to the recent amendments to section 667, subdivision (a)(1) and section 1385.

We affirm defendant's convictions and remand for another sentencing hearing.

FACTS

On the morning of February 24, 2013, Correctional Officers Riley and Casas were the observation officers for a yard at the California Correctional Institution in Tehachapi. They were stationed in an upstairs control booth.

¹ All further statutory citations are to the Penal Code unless otherwise indicated.

Around 8:40 a.m., the floor officers brought 15 to 17 inmates for their time in the yard. The inmates included defendant, Victor Romo, Albert Rivas, and Anthony Gomez. The inmates did not have any visible injuries prior to entering the yard.

The Attack on Gomez

Around 9:00 a.m., Gomez was attacked by other inmates in the yard.

Officers Riley and Casas saw the incident from the control booth and testified about their personal observations of the attack. There were four cameras in the yard that recorded the incident from multiple angles, and the videotapes were played for the jury.

Officer Riley testified that immediately before the fight began, defendant was playing handball in the yard. Gomez was facing the handball court. Romo approached Gomez, they shook hands, and they talked with each other. Rivas stood next to Romo, and Romo continued to talk with Gomez.

As Gomez watched other inmates playing handball, Romo moved behind Gomez and suddenly punched Gomez in the face. Rivas jumped on top of Gomez. Romo and Rivas punched and kicked Gomez.

Officer Riley testified Romo punched and kicked Gomez “[a]s hard as he could,” and Rivas used an “extreme” amount of force on him.

Defendant Joins the Assault

Officer Riley testified defendant turned around and saw the altercation. Defendant ran from the handball court and joined the fight “within seconds.”

Officer Casas testified defendant punched Gomez in the face. Officer Riley testified defendant punched and kicked Gomez with the same force and intensity as Romo and Rivas.

Officer Riley testified Gomez tried to defend himself by putting his hands up and swinging back, but he did not hit anyone. Romo pulled down Gomez and Gomez fell. Defendant, Romo and Rivas continued to punch and kick Gomez as he lay on the concrete ground.

Gomez briefly got away from defendant, Romo, and Rivas, but they caught him against the wall of the yard. Defendant, Romo, and Rivas again punched and kicked Gomez with the same use of force.

Officers Riley and Casas testified that it never appeared that defendant was coming to the “rescue” of Gomez, or that he tried to pull Romo or Rivas away from Gomez. Instead, defendant continued to punch and kick Gomez along with Romo and Rivas.

The Officers Fire Nonlethal Rounds

When Officer Riley saw the attack on Gomez, he immediately ordered all the inmates to get down and the alarm was sounded. All the inmates in the yard followed orders and went to the ground. However, defendant, Rivas, and Romo failed to obey the orders and continued to beat Gomez, who was still trying to protect himself.

Officer Riley fired six nonlethal six-inch foam rounds at defendant. Defendant was hit by four rounds in the leg, hip, and back. The rounds did not affect defendant, and he continued to punch and kick Gomez in the face. Other inmates in the yard crawled away to avoid being hit by the rounds.

Officer Casas fired five nonlethal rounds in the yard. The first round was aimed at Rivas. Rivas moved, the round missed him, and it hit the concrete ground and ricocheted to an “unknown location.” Casas’s second round hit Rivas. Casas fired three more rounds that hit Romo and Rivas.

Officer Casas testified that defendant, Romo, and Rivas finally stopped the attack on Gomez after Casas fired his last round. The entire assault lasted about one minute 15 seconds.

Removal of Inmates from the Yard

The officers pulled Gomez, Romo, defendant, and Rivas out of the yard and placed them in separate custodial areas. Officer Riley later checked the yard for weapons and did not find anything.

Defendant, Rivas, and Romo had injuries on their bodies from being hit by the nonlethal rounds. Their hands were swollen and red, consistent with having punched something.

Officer Riley testified that Soto was one of the inmates in the yard, but Soto was not involved in the fight, and Riley did not fire at him. Riley testified that a photograph of Soto, taken immediately after the incident, showed a scratch on his face and a mark on his back. Riley testified the injuries could have been inflicted from one of the nonlethal rounds that did not hit defendant, Romo, or Rivas.

Gomez's Injuries²

Officer Reimers testified that at 9:45 a.m., shortly after Gomez was removed from the yard, he took photographs of Gomez and his injuries. Reimers testified the nonlethal rounds that were fired into the yard did not cause Gomez's facial injuries because he did not see the distinctive ring marks from those rounds on his face. Instead, he believed Gomez's facial injuries were consistent with being repeatedly punched and kicked.

Gomez was taken by wheelchair to the prison's clinic. Patricia Williams, the clinic's nurse, testified Gomez had multiple lacerations on his face, redness and swelling around both eyes, an abrasion and dried blood on the top of his head, bruises and bleeding from his ears, swelling and dried blood on his hands, and abrasions and dried blood on his leg. The injuries on in his hands were consistent with defensive wounds.

Williams could not stop the bleeding from a laceration above Gomez's right eye, and it was swollen and starting to close. Gomez's left eye was completely closed.

² During pretrial hearings, the prosecutor disclosed that Gomez, the victim, had not cooperated, he would not testify, he had not been subpoenaed, and he would not appear at trial. The prosecutor moved to call an expert to testify that an inmate in general might refuse to cooperate because he was afraid of retaliation or being called a "snitch." Defendant objected. The court found such an opinion was inadmissible and denied the prosecutor's motion. The jury did not hear any evidence as to why Gomez did not appear at trial.

Williams was concerned that he may have suffered an orbital fracture in the left eye and decided to send him to the hospital by ambulance.

Williams testified that the nonlethal projectiles fired into the yard leave a distinctive halfmoon mark on a person's body. Williams believed the injuries to Gomez's eyes were consistent with being repeatedly punched and kicked and not from the projectiles, because they did not have the distinctive marks that would have been caused by the nonlethal rounds.

Dr. James Cusator, a radiologist associated with San Joaquin Community Hospital, testified that based on CT scans, Gomez suffered an orbital blowout fracture to the socket of his left eye. The injury was consistent with being caused by blunt trauma from something hitting the left side of his skull with great force. A blowout of such magnitude would require surgical correction, or the victim could lose his eye.³

Dr. Cusator testified such an injury could have resulted from blunt force inflicted as a result of being in an assault, a motor vehicle accident, hit by a baseball or bat, kicked, hit by a round projectile that was going fast, or "[a]nything that could create a high enough force. Blunt trauma could create a blowout fracture."

CDCR's Investigation into Use of Force

Correctional Lieutenant Gaworski testified he was assigned to investigate the officers' decision to fire nonlethal rounds into the yard. CDCR always conducted such an investigation "[w]henver the staff uses force. Any forced option," whether it was nondeadly or deadly force. The purpose of the investigation was to determine whether "the force was appropriate given actions of the inmates or the parties involved" and "justified ... in conjunction with [CDCR's] use-of-force policy." CDCR's training was for the nonlethal rounds to be fired "from the waist down."

³ Dr. Cusator did not address whether Gomez had surgery. In a pretrial motion, the People stated that Gomez had facial reconstruction surgery with a metal plate secured to his skull to help rebuilt his orbital socket. This evidence was not introduced at trial.

As part of his investigation, Lieutenant Gaworski reviewed the reports prepared by the officers and video of the incident. He also had to account for all rounds fired by the prison staff. If a round was not accounted for, he had to examine all the injuries received by the inmates to determine if any of them could be attributed to the staff's use of force.

Lieutenant Gaworski testified that when he investigated the officers' use of force for the assault on Gomez, he determined 11 nonlethal rounds were fired into the yard and three rounds were unaccounted for. It was possible one of the rounds may have ricocheted off the concrete ground.

Lieutenant Gaworski determined Soto, another inmate, was injured in the yard that day, but he not involved in the attack on Gomez. Based on a medical report about Soto's injury and the video from the yard, Gaworski determined Soto was hit in the face with a nonlethal round. Gaworski testified the photograph of Soto's facial injury was also consistent with the distinctive mark make by a nonlethal round.⁴

Lieutenant Gaworski reviewed the photographs of Gomez's injuries. He testified the abrasions to Gomez's *right eye* could have been caused by a nonlethal round. The abrasions also could have resulted from friction if Gomez's face was rubbed on the cement in the yard. Gaworski did not reach a definitive conclusion whether Gomez's right eye abrasions were inflicted by a nonlethal round.

As for the injuries to Gomez's *left eye*, Lieutenant Gaworski testified they were not caused by a nonlethal round and were instead consistent with being inflicted by punches and kicks.

The Video of Gomez's Injuries

Lieutenant Gaworski testified that on or about March 1, 2013, six days after the assault, he conducted a telephone interview with Gomez in his prison cell. Gomez answered his questions only as to his name and CDCR number.

⁴ Williams, the nurse, examined Soto after the incident and testified the injury on his cheek was consistent with being hit by a nonlethal round.

Lieutenant Gaworski also videotaped Gomez in his cell, and testified the video was a fair and accurate depiction of how Gomez looked that day. The video was played for the jury. It did not have any audio and lasted about 30 seconds. Gaworski testified it showed that Gomez’s “eye sockets, facial features, around the eyes, were reddened and discolored. And then there was the scar on his right eyebrow.” A still photograph from the same video was also introduced that showed Gomez’s facial injuries.⁵

Defendant did not testify or present any evidence.

Conviction and Sentence

On May 5, 2016, after a jury trial, defendant was convicted as charged of count 1, assault on Gomez with a deadly weapon or by any means of force likely to produce great bodily injury while confined in a state prison. The jury found he personally inflicted great bodily injury on Gomez. The court found true the allegations that defendant had two prior strike convictions and two prior serious felony enhancements.

At the two sentencing hearings in this case, the court denied defendant’s request to dismiss the prior strike convictions and sentenced defendant to the third strike term of 25 years to life for count 1, plus three years for the great bodily injury enhancement and five years for one prior serious felony enhancement.⁶

⁵ As we will explain, when the prosecutor started to ask Lieutenant Gaworski about the video of Gomez, defense counsel raised a hearsay objection and the court conducted an unreported sidebar. Thereafter, the court overruled the objection, gave a limiting instruction to the jury, acknowledged defendant’s continuing objection to the video and a still photograph from the video, and directed the prosecutor to continue. The jury was shown the silent video. The court subsequently placed defendant’s objections on the record. In issue I, *post*, we will address defendant’s contentions that the silent video was testimonial hearsay and violated his confrontation rights because Gomez never testified at trial or was found unavailable.

⁶ In issue III, *post*, we will address the court’s decision to deny defendant’s request to dismiss the prior strike convictions. In issue IV, *post*, we will review the two sentencing hearings and why the matter should be remanded for another sentencing hearing.

DISCUSSION

I. Admission of the Silent Video of Gomez

Defendant raises several issues about the court's decision to admit the silent video of Gomez that was taken in prison by Lieutenant Gaworski. He argues the video constituted testimonial hearsay within the meaning *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), and the admission of the evidence violated his constitutional right to confront and cross-examine witnesses since Gomez never appeared at trial, he was not subpoenaed, and the prosecution never introduced any evidence to show he was unavailable. Defendant also argues the video was irrelevant and prejudicial.

The People argue defendant failed to timely object to the silent video and waived any confrontation challenge, and that the video was not testimonial hearsay and admissible.

We review defendant's trial objections and the court's decision to admit the silent video and find it did not amount to testimonial hearsay.

A. Defendant Objects to the Video

As set forth above, the prosecutor advised the court that Gomez, the victim, had not cooperated and would not testify. The prosecutor did not attempt to subpoena Gomez, and he did not appear at trial.

Also, as set forth above, Lieutenant Gaworski testified about his investigation into the officers' use of nonlethal force, and that he had to account for all the rounds fired into the yard during the attack on Gomez on February 24, 2013. Gaworski testified that he conducted a videotaped interview with Gomez in prison on or about March 1, 2013.

When the prosecutor asked Lieutenant Gaworski about the video, defense counsel immediately raised a hearsay objection and the court conducted an unreported sidebar conference.

B. The Court's Admonition to the Jury

After the unreported conference, the court overruled the defense's hearsay objection but instructed the jury as follows:

"You're going to see a video that has no sound. You're not to speculate. You may see the person in the video speaking. You're not going to hear what the person is saying. You're not going to speculate about what the person is saying.

"If you happen to be able to read lips, you're not to read lips and translate, in any way, what the person is saying.

"This video is being admitted for a limited purpose, just to show the condition of the person in the video. That's the only way that the jury may use that."

The court noted defense counsel's continuing objections and directed the prosecutor to continue.

Thereafter, Lieutenant Gaworski testified as set forth above and the silent video was played for the jury. The prosecution also introduced a still photograph of Gomez that was taken from the video.

C. Defense Counsel States his Objections to the Video

After the prosecution rested and the jury was excused, the court asked defense counsel to place his objections on the record about the introduction of the silent video of Gomez and the still photograph taken from the video, as they discussed during the unreported sidebar conference.

"[DEFENSE COUNSEL]: Your honor, basically, the district attorney's office may not attempt to remove and subpoena Mr. Gomez to testify in this trial. It is, in my opinion, completely inappropriate for them to bring in a video of an interview that he gives to the lieutenant. Because I have no opportunity to cross-examine him on that. I don't know what purpose it serves. They can impeach or try to attack a witness that they have refused to bring in as a witness. I think that's inappropriate. It's hearsay. And even if you take the sound off that thing, it's always a danger that – and I think the Court was very cognizant of that danger. Because it warned the jury not to read the lips of the individuals in the tape. It certainly looked really gory, like the Tehachapi version of the Men From

the Green Lagoon, I think it was called. And I think in order to bring the passions of the jury to support Mr. Gomez and his injuries, I don't think it proves anything. They have to prove that he was injured on the day of the incident, which is February 24th. How do you look three days later or three years later is completely irrelevant.

“THE COURT: Well ... is it not, perhaps, relevant to the enhancement to show there was great bodily injury?

“[DEFENSE COUNSEL]: I don't think so, given that we have the good doctor – Cusator...

“[THE PROSECUTOR]: Cusator.

“[DEFENSE COUNSEL: Cusator that came in and testified about the displacement of some of the ocular bridges around his left eye. I mean, that was enough for great bodily injury. So that was – that's the reason I was objecting to it. And the reason—

“THE COURT: Well, let me ask you this.

“[DEFENSE COUNSEL]: Yes.

“THE COURT: If [the prosecutor] wanted to show the video tape ... to the doctor yesterday, would you have had the same objection?

“[DEFENSE COUNSEL]: Yes.”

The prosecutor argued the audio was not played for the jury, and video was relevant to prove the great bodily injury enhancement. It was taken six days after the attack, it showed Gomez's appearance, the seriousness of the wounds, and the “continued bruising and ... some form of permanent disfigurement.” The prosecutor argued the court's admonishment to the jury was appropriate to address any of defendant's concerns.

The court stated that during the unreported sidebar, it overruled defense counsel's objections but offered to give the limiting instruction for the jury not to speculate about any conversation that occurred in the video or read lips. The court stated it gave the limiting instruction because counsel agreed to it. Defense counsel said he agreed to the limiting instruction as the “lesser of two evils” since the court was going to admit the video.

D. The Court's Decision to Admit the Video

The court explained why it had admitted the video over defendant's objections.

"Here's why the Court let the video be played: One, there was no audio to the video. Your original objection was that it was hearsay. But there was no audio to the video.

"The portion that was shown was – showed the features of Mr. Gomez six days later, which would be relevant to show the – even though we did have the testimony of the doctor, we didn't have any picture to show the injury after, other than the photos that were shown to the jury on the date of the incident. So it's relevant to show that there was an injury. There was still damage. And that all is relevant, in the Court's estimation, to show that – support if the jury gives it weight that there was great bodily injury inflicted. So that is why the Court allowed that.

"The Court will also point out: The portion of the video that was played was probably about 30 seconds. And whatever Mr. Gomez said, it wasn't much. And I believe the witness testified the first thing he asked was to identify himself – Mr. Gomez to identify himself. And I think that's the only part that was shown in the video to the jury.

"The second thing is it's already been established, it's clear – and this goes back to the first part of the case – that Mr. Gomez was not cooperative. Nobody is—nobody disputed that. The jury already knows that. Everybody voir dired – I think there was no objection of the voir dire by the People saying: Would you be willing to convict if we didn't hear from the victim in this case. So I don't think it's a surprise. So I really don't think it has any prejudicial effect. But your objection is noted for the record."

E. Defendant has not Waived Review of this Issue

On appeal, the People argue defendant has forfeited any constitutional claim based on the confrontation clause because he objected "only after the evidence had already been admitted, the prosecution had rested, the jury had been excused, and a recess had been taken."

The record refutes this assertion. Defendant immediately raised a hearsay objection when Lieutenant Gaworski started to testify about the video. The court conducted an unreported sidebar conference, overruled the objection, and gave the

limiting instruction to the jury. The court directed defense counsel to place his objections on the record after the prosecution had rested. Defendant preserved his objections based on the alleged violation of the confrontation clause, relevancy, and prejudice.

F. Crawford and Testimonial Hearsay

“In light of our hearsay rules and *Crawford*, a court addressing the admissibility of out-of-court statements must engage in a two-step analysis. The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is *testimonial hearsay*, as the high court defines that term.” (*People v. Sanchez* (2016) 63 Cal.4th 665, 680, italics in original.)

“Evidence Code section 1200 defines hearsay as ‘evidence of a *statement* that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.’ [Citation.] A statement, in turn, is defined as an ‘oral or written verbal expression or ... nonverbal conduct *of a person* intended by him as a substitute for oral or written verbal expression.’ [Citation.] ‘“Person” includes a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity.’ [Citation.]” (*People v. Goldsmith* (2014) 59 Cal.4th 258, 273, italics added in original.)

Under *Crawford*, it is generally a violation of the confrontation clause to admit testimonial hearsay against a criminal defendant “unless (1) the declarant is unavailable to testify and (2) the defendant had a previous opportunity to cross-examine the witness or forfeited the right by his own wrongdoing. [Citations.]” (*People v. Sanchez, supra*, 63 Cal.4th at p. 680.) A testimonial statement is one “‘made under circumstances which

would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.’ ” (*Crawford, supra*, 641 U.S. at p. 52.)

Whether a statement is testimonial turns on “ ‘whether, in light of all the circumstances, viewed objectively, the “primary purpose” of the conversation was to “creat[e] an out-of-court substitute for trial testimony.” ’ [Citation.]” (*People v. Rangel* (2016) 62 Cal.4th 1192, 1214–1215.)

G. *The Silent Video was not Testimonial Hearsay*

We review the court’s denial of a hearsay objection for an abuse of discretion. (*People v. Fields* (1998) 61 Cal.App.4th 1063, 1067.) However, we independently review whether a statement was testimonial and implicated the constitutional right of confrontation. (*People v. Nelson* (2010) 190 Cal.App.4th 1453, 1466.)

Defendant’s confrontation clause arguments are without merit. The silent video and still photograph that showed Gomez’s injuries did not constitute hearsay. “Evidence is defined as ‘testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.’ [Citation.] Photographs and videotapes are demonstrative evidence, depicting what the camera sees. [Citations.] They are not testimonial and they are not hearsay, that is, ‘evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated....’ [Citation.]” (*People v. Cooper* (2007) 148 Cal.App.4th 731, 746; *People v. Thomas* (2012) 53 Cal.4th 771, 802 [photographs of victim’s wounds and clothing were not testimonial hearsay within the meaning of *Crawford*].)

Defendant asserts that while “not stated on the record,” the trial court agreed with defense counsel that the video was a statement and testimonial hearsay, which was why the court agreed to introduce the video without the sound to prevent the jury from hearing verbal statements. As set forth above, the court considered defendant’s immediate hearsay objection to the video, and it was well aware that Gomez had not been called to

testify, subpoenaed, or shown to be unavailable. When the court later explained why it admitted the video, it stated that “there was no audio to the video. Your original objection was that it was hearsay. But there was no audio to the video.” It is not clear whether there was ever any audio on the video, or that the court overruled the hearsay objection because it ensured the audio would be turned off when it was shown to the jury. In any event, while Gomez’s verbal statements on the video (if any) might have constituted hearsay, the court obviously recognized this problem because it partially granted defendant’s hearsay objection to the video and ensured the jury would not hear any audio and only see a silent video that showed his injuries.

Defendant next argues that while the video was played without sound, it showed Gomez speaking and his “non-verbal communication such as demeanor” so that it was testimonial hearsay. A person’s “nonverbal, nonassertive, emotional behavior” is not subject to the hearsay rule. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1161–1162.) Nonassertive conduct is not hearsay. (*People v. Fields, supra*, 61 Cal.App.4th at p. 1068.) “ ‘[N]onverbal conduct’ – such as a person’s silence – constitutes a ‘statement’ under the hearsay rule only if it was ‘intended by [the person] as a substitute for oral or written verbal expression.’ [Citation.]” (*People v. Zamudio* (2008) 43 Cal.4th 327, 350; Evid. Code, § 225.)

“[C]onduct is assertive if the actor at the time intended the conduct to convey a particular meaning to another person. [Citation.] For example, a nod of the head in response to a question calling for a yes-or-no answer, or a gesture pointing to a particular person when asked to identify a perpetrator, are examples of assertive conduct.” (*People v. Jurado* (2006) 38 Cal.4th 72, 129.) Crying and other emotional displays depicted in a videotaped police interrogation are, “by themselves, ... nonassertive conduct, and thus not within the hearsay rule.” (*Id.* at p. 129; *People v. Williams* (2006) 40 Cal.4th 287, 318.) When a defendant’s nonassertive conduct is intertwined with statements made to the

police denying culpability, however, the trial court may properly exclude the entirety of the recorded interview as inadmissible hearsay. (*People v. Williams, supra*, at p. 318.)

There is no evidence that the silent video showed that Gomez intended to make any gestures to convey a message or meaning, or that he engaged in any conduct that constituted assertive or communicative acts. (See, e.g., *People v. Myers* (2014) 227 Cal.App.4th 1219, 1226–1227 [victim’s act of raising his hands when confronted by the defendant may have carried the “universal meaning” of surrender and an intentional act].) Moreover, the court instructed the jurors not to speculate about what Gomez could have said on the video, and not to read lips or translate if they had that ability. The court further instructed that the evidence was only admitted to show Gomez’s physical condition, and there is no evidence to rebut the presumption that the jurors followed the court’s instruction. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

Even if the video constituted hearsay, the evidence was not testimonial in nature because it was prepared for a purpose other than preserving facts for later use at trial. Lieutenant Gaworski testified that he investigated the incident because correctional officers had used force and he had to determine whether their use of force was within CDCR’s guidelines. In doing so, Gaworski discovered that three of the 11 nonlethal rounds fired into the yard were not accounted for, and had to determine what happened to them. He determined that Soto was injured by one of the rounds that could have ricocheted off the concrete ground. He examined Gomez for this same purpose. Gaworski testified the abrasions to Soto’s right eye could have resulted from one of the other unaccounted for rounds. The entirety of the record shows that Gaworski’s contact with Gomez was not part of the criminal investigation into defendant’s assault on Gomez.

H. Relevance and Prejudice

As a separate matter (issue II in defendant’s appellate brief), defendant argues that the video should have been excluded because it was irrelevant and prejudicial pursuant to Evidence Code section 352, since the prosecution had already introduced evidence of

Gomez's injuries through the testimony of the prison's nurse and the physician, and the photographs taken immediately after the attack.⁷

“ ‘Relevant evidence’ means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) The test of relevance is whether the evidence tends logically, naturally, and by reasonable inference to establish a material fact. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1057–1058; *People v. Panah* (2005) 35 Cal.4th 395, 474.)

Relevant evidence will be excluded if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice. (Evid. Code, § 352.) “ ‘The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.’ [Citations.] ‘Rather, the statute uses the word in its etymological sense of “prejudging” a person or cause on the basis of extraneous factors. [Citation.]’ [Citation.]” (*People v. Zapien* (1993) 4 Cal.4th 929, 958.)

We review the court's rulings on relevance and prejudice for an abuse of discretion. (*People v. Wallace, supra*, 44 Cal.4th 1032, 1057–1058; *People v. Panah, supra*, 35 Cal.4th at p. 474; *People v. Minifie* (1996) 13 Cal.4th 1055, 1070.)

The court did not abuse its discretion in finding the video and still photograph of Gomez were relevant and probative of the nature and extent of his physical injuries. Defendant was charged with a violation of section 4501, assault with a deadly weapon or

⁷ In making this argument, defendant states the video was taken “after [Gomez's] surgical repair and was not indicative of the actual injury after the fight.” Dr. Cusator testified at trial that surgery would be required to repair the orbital fracture and save the eye. In a pretrial motion, the People stated that Gomez had facial reconstruction surgery with a metal plate secured to his skull to help rebuilt his orbital socket. There was no evidence introduced at trial about if or when Gomez had surgery.

by any means of force likely to produce great bodily injury while confined in a state prison, with a section 12022.7 enhancement for the personal infliction of great bodily injury. “Proof that a victim’s bodily injury is ‘great’ – that is, significant or substantial within the meaning of section 12022.7 – is commonly established by evidence of the severity of the victim’s physical injury, the resulting pain, or the medical care required to treat or repair the injury. [Citations.]” (*People v. Cross* (2008) 45 Cal.4th 58, 66.)

While the defense did not call any witnesses, counsel cross-examined the correctional officers, the prison nurse, and the physician and attempted to show that Gomez’s injuries were not inflicted by defendant and his accomplices but could have resulted from being hit by one of the nonlethal rounds that had not been accounted for. Lieutenant Gaworski conceded that the abrasions above Gomez’s right eye could have resulted from one of the nonlethal rounds, but Gaworski and the other witnesses testified that the orbital fracture to Gomez’s left eye resulted from the assault and beating. In any event, the video and still photograph were extremely probative of the nature of Gomez’s injuries since they were taken only six days after the beating and supported the opinions of the prison nurse and the physician about the seriousness of his facial and head injuries.

II. The Court’s Ruling on Defendant’s Postverdict *Romero* Request

As we will explain, defendant initially entered into a negotiated disposition and pleaded no contest to the charged offense. Prior to the sentencing hearing, defendant moved to withdraw his plea, the court granted the motion, and the instant jury trial resulted. After he was convicted by the jury, he filed a request for the court to dismiss his two prior strike convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). The court denied the postverdict request and imposed a third strike term.

On appeal, defendant argues that in the course of the pretrial negotiated disposition, the court “offered” to grant a defense request to dismiss his prior strike convictions and engaged in improper judicial plea bargaining, and then abused its

discretion when it denied his postverdict request to dismiss the strike convictions since it had already declared an intent to dismiss the strikes during the plea negotiations.

In order to address these contentions, we will review the charged offenses, the pretrial plea proceedings, and the court's denial of defendant's postverdict request to dismiss the prior strike convictions. Defendant's arguments are refuted by the sequential history of defendant's pretrial plea and postverdict motion.

A. *The Pretrial Plea Proceedings*

On February 4, 2015, the complaint was filed that charged defendant and codefendants Romo and Rivas with count 1, violation of section 4501 with a great bodily injury enhancement. It was further alleged that defendant had two prior strike convictions. Romo and Rivas each had one prior strike conviction.

On March 20, 2015, the preliminary hearing was held for all three defendants and they were held to answer.

On May 14, 2014, Judge John S. Somers convened a hearing and stated that defendant and his codefendants were entering into plea agreements. The court stated that earlier that day, codefendant Romo pleaded no contest to the assault charge and admitted the great bodily injury enhancement, for an indicated sentence of seven years.

The court made the following statements about the pleas for defendant and Rivas:

“THE COURT: The matter has been discussed in my chambers actually as to both defendants. My understanding is there is a proposed disposition based on the People's offer in the matter as to Mr. Rivas and there is a proposed disposition as to [defendant]. There is a counteroffer in that case made – People are not making an offer as to [defendant] – or at least the plea of 25 to life because of his additional strike. The defense has counteroffered with 7. Those were rejected.

“There is a court indicated Romero and disposition as to [defendant], which is a court indicated Romero, which is being done over the People's objection.” (Italics added.)

Rivas pleaded no contest to the assault charge and admitted the great bodily injury enhancement and one prior strike conviction for an indicated sentence of five years eight

months (one-third the midterm). Rivas's attorney said he still faced an unrelated case for possession of a shank.

The court turned to defendant's case and stated:

“THE COURT: Okay. As [*sic*] to [defendant], in this matter he has are same [*sic*] as those relating to Mr. Romo and Mr. Rivas but he also has an additional felony prior or strike. In the matter the Court's indicated that it would strike one of the serious felony or strike priors. [Defendant] would be entering a plea to count one, the [section] 4501, admitting the great bodily injury allegation and one strike – both strikes would be admitted, but the Court's indicating it will grant a *Romero* as to one so that would be for a sentence of 11 years in state prison consecutive to his present offense. [¶] And, [referring to the prosecutor], it's clear that's a court indicated. *The People are opposed to the Romero being granted as to him.*” (Italics added.)

The prosecutor objected to dismissal of defendant's prior strike convictions. The prosecutor asked the court to have defense counsel file a written *Romero* motion so that the People could file opposition. The court agreed.

Thereafter, defendant pleaded no contest to the charged offense, and admitted the great bodily injury requirement and the two prior strike convictions. The court referred the matter for a probation report and set the sentencing hearing.

B. Postplea Romero Request

On June 8, 2015, after he had entered the plea, defendant filed a request for the court to exercise its discretion and dismiss the two prior strike convictions in the interest of justice pursuant to section 1385 and *Romero*. Defendant argued he was the youngest of the inmates involved in the assault, and it was the first act of violence he was charged with while being in prison.

On June 8, 2015, the People filed a reply and argued the court would abuse its discretion if it dismissed any of defendant's prior strike convictions based on the nature and circumstances of defendant's prior felony offenses and the current offense.

C. Defendant's Motion to Withdraw his Plea

On June 17, 2015, Judge Somers convened the scheduled sentencing hearing after defendant's plea. Defendant requested a hearing pursuant to *People v. Smith* (1993) 6 Cal.4th 684 (*Smith*) to dismiss his attorney.⁸ Judge Somers sent the matter to another judge to hear defendant's motion. Judge Brownlee conducted an in camera hearing on defendant's motion to dismiss his attorney and denied it.

Thereafter, Judge Somers granted defense counsel's motion to continue the sentencing hearing to prepare a motion to withdraw the plea.

On July 22, 2015, defendant filed a motion to withdraw his plea and asserted his plea was not knowing and intelligent. According to defense counsel's declaration, defendant felt pressured when he entered his plea into "taking the deal, after he had been offered a lower offer," and he was not properly informed of the effect of the plea on another pending case. The People filed a reply and stated they did not object to defendant's motion to withdraw his plea.

On July 29, 2015, Judge Somers granted defendant's motion to withdraw his plea and reset the matter for trial. The court noted the People did not oppose defendant's motion to withdraw his plea "because they felt the matter should be resolved for a stiffer sentence than the Court indicated in the matter," and defendant did not want to accept "that which [he] previously had, which is fine." Defendant's matter was set for trial.

Codefendant Rivas also filed a motion to withdraw his plea. The People did not oppose it, and the court granted the motion.

⁸ *Smith* held a defendant's postplea motion to discharge appointed counsel based on ineffective assistance was subject to the test set forth in *People v. Marsden* (1970) 2 Cal.3d 118. (*Smith, supra*, 6 Cal.4th at pp. 695–696.)

D. The Codefendants' Pleas

An amended information was subsequently filed against defendant and codefendants Rivas and Romo, that again alleged a violation of section 4501 and the great bodily injury enhancement.

As to defendant, it further alleged he had two prior serious felony enhancements (§ 667, subd. (a)) and two prior strike convictions.

Romo was alleged to have one prior strike conviction. Rivas was alleged to have one prior strike conviction and one prior serious felony enhancement.

Prior to defendant's trial, codefendants Rivas and Romo entered into plea agreements. The transcripts of these agreements are not part of the instant record but according to the probation report, Rivas pleaded guilty to a violation of section 245, subdivision (a)(4), assault by any means of force likely to produce great bodily injury, and admitted the great bodily injury enhancement, and admitted the prior conviction allegations. He was sentenced to nine years in prison.

Romo pleaded to the charged violation of section 4501 and admitted the great bodily injury enhancement and the prior conviction allegation. He was sentenced to seven years in prison.

At defendant's postverdict sentencing hearing, the prosecutor stated that Rivas and Romo received their sentences because unlike defendant, they did not have "two qualifying strike priors."

E. Defendant's Trial and Conviction

On April 26, 2016, Judge Katz (who did not preside over defendant's pretrial plea proceedings) convened defendant's jury trial on an amended information.

On May 5, 2016, defendant was convicted as charged and the jury found the great bodily injury enhancement true. On May 6, 2016, the court found the prior conviction allegations true.

F. Defendant's Postverdict Request to Dismiss the Prior Strike Convictions

On May 16, 2016, defendant filed a request for the court to exercise its discretion and dismiss the prior strike convictions pursuant to section 1385 and *Romero*. Defendant argued his participation in the assault was minimal, he was not the cause of the victim's primary injuries, he was the youngest of the three charged suspects, this was his first act of violence while in prison, and it would be contrary to the interests of justice to sentence him to a life term "while the main attackers [Romo and Rivas] all got less than ten ... years each."

Defendant also argued he was in a "dangerous environment" and the "victim himself was a very large, guy, very scary fellow." Defendant complained that he was not offered less than 10 years like his codefendants and "because of that, we were forced to go to trial."

On May 20, 2016, the People filed opposition and argued the court would abuse its discretion if it dismissed defendant's prior strike convictions based on the nature and circumstances of the prior felonies for carjacking and robbery because they involved different victims on two different dates. The People also argued defendant did not have a minimal role in the assault on Gomez and he repeatedly kicked the victim's head. As for the sentences imposed in this case, the People argued defendant was not similarly situated to codefendants Romo and Rivas because he had two qualifying prior strike convictions.

G. The Court's Imposition of the Third Strike Term

On June 3, 2016, Judge Katz conducted the sentencing hearing and denied defendant's request to dismiss the prior strike convictions. The court stated that it knew the parties tried to settle the case, but it did not know that the codefendants did not have two prior strike convictions and that "could be the reason why a different offer was made to those two people. It may not have been made on the basis of what the facts were in this case."

The court rejected defendant's arguments about the level of his complicity and whether he caused the victim's injuries.

"[T]he Court, first of all, respects the jury's findings and the jury's verdict. The jury must not have been persuaded by your argument or evidence that the grenades caused the injury to the victim. I don't know if there's any evidence that the grenades or whatever they were called, these projectiles that were shot once the fight started – obviously, there was evidence that some people were hit by those. But ... as [the prosecutor] pointed out, there's no evidence to support or suggest, not I don't think there was any presented, that the significant injury suffered by the victim in this case was caused by the CDC offices firing the grenades.

"The – you make an argument about ... the victim's conduct. What, if anything, the victim did to, for lack of a better word, deserved to be attacked. And I don't think there was any evidence that there was duress."

The court stated that it would follow the standard in *People v. Williams* (1998) 17 Cal.4th 148 (*Williams*) to determine whether the prior strike convictions should be dismissed, including "the prior serious or violent felony convictions, the person's background, and the prospects that the person could be deemed outside the spirit or the scheme of the Three Strikes Law." The court stated that it could not make that finding based on the evidence in the case.

The court imposed the third strike term of 25 years to life plus three years for the great bodily injury enhancement. The court subsequently recalled the sentence and imposed an additional term of five years for the section 667, subdivision (a) prior serious felony enhancement.

H. Analysis

Defendant argues the court abused its discretion when it denied his postverdict request to dismiss the prior strike convictions because of the court's statements during the pretrial plea proceedings, based on the following argument:

"As the court was previously aware of [defendant's] criminal history and the nature of the injuries to the victim, the court abused its discretion in denying the *Romero* motion and imposed a form of trial tax on [defendant] for going to trial. No new charges were added between the time of the

change of plea was entered initially and the guilty verdict at trial. The victim was not called to testify so [defendant] did not put the victim through any additional hardship. The difference between the 33 years [defendant] received after trial and the 11 year offer he had before trial is substantial and proof [of] the abuse of discretion and harmful error in this case.”

Defendant’s arguments are based on several false premises. First, the court did not engage in inappropriate “judicial plea bargaining” during the pretrial plea proceedings and instead stated an indicated sentence. “When a trial court properly indicates a sentence, it has made no *promise* that the sentence will be imposed. Rather, the court has merely disclosed to the parties at an early stage – and to the extent possible – what the court views, on the record then available, as the appropriate sentence so that each party may make an informed decision.” (*People v. Clancey* (2013) 56 Cal.4th 562, 575, original italics.) “[A]n indicated sentence is not a promise that a particular sentence *will* ultimately be imposed at sentencing. Nor does it divest a trial court of its ability to exercise its discretion at the sentencing hearing, whether based on the evidence and argument presented by the parties or on a more careful and refined judgment as to the appropriate sentence. [T]he utility of the indicated-sentence procedure in promoting fairness and efficiency depends to a great extent on whether the record then before the court contains the information about the defendant and the defendant’s offenses that is relevant to sentencing. The development of new information at sentencing may persuade the trial court that the sentence previously indicated is no longer appropriate for this defendant or these offenses. Or, after considering the available information more carefully, the trial court may likewise conclude that the indicated sentence is not appropriate. Thus, even when the trial court has indicated its sentence, the court retains its full discretion at the sentencing hearing to select a fair and just punishment.” (*Id.* at p. 576, original italics.)

Second, the record refutes defendant’s assertion that the during the pretrial plea hearing, the court was aware of the nature of Gomez’s injuries and defendant’s prior

record. Defendant entered his plea to the charges alleged in the information for assault, the great bodily injury enhancement, and the two prior strike convictions. While the preliminary hearing had already been held, there is no indication the court was aware of the nature and circumstances of the charged offense, the extent of Gomez's injuries, or the underlying circumstances of the prior strike convictions.

Third, the court gave an indicated sentence during the pretrial plea hearing based on possibly dismissing the prior strike convictions. The People strongly objected to the dismissal of any prior strike convictions. The court acknowledged the objections and granted the People's request for defendant to file a formal motion to dismiss the strikes so that the People could file opposition, and the court could then decide the question. The court could have considered the pleadings and decided not to dismiss the strikes or accept the plea.

Fourth, the court never addressed any postplea *Romero* request because defendant moved to withdraw his plea before the postplea sentencing hearing. The court granted defendant's motion to withdraw and noted the People did not oppose the motion because it had already disagreed with the proposed indicated sentence.

As for defendant's subsequent jury trial, it was conducted by a different judge who did not preside over the pretrial plea proceedings. Thus, when the court considered defendant's postverdict request to dismiss the prior strike convictions, it was addressing the *Romero* question for the first time without giving any prior indication as to how it would decide the matter. While the sentencing court acknowledged that the parties had attempted to resolve the case prior to trial, there is nothing in the record to show that the court denied the post-verdict *Romero* request as "a form of trial tax on [defendant] for going to trial."

Turning to the court's sentencing decision, it had discretion to strike a prior serious felony conviction only if the defendant fell outside the spirit of the "Three Strikes" law. (*Williams, supra*, 17 Cal.4th at p. 161.) "[T]he three strikes law not only

establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper.” (*People v. Carmony* (2004) 33 Cal.4th 367, 378.) In deciding whether to strike a prior conviction, the court “must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*Williams, supra*, 17 Cal.4th at p. 161.)

A trial court abuses its discretion when it refuses to strike a prior felony conviction only in limited circumstances, such as where the court is unaware of its discretion to dismiss or considers impermissible factors in refusing to dismiss, or if the sentencing norm under the three strikes law leads, as a matter of law, to an arbitrary, capricious, or patently absurd result under the circumstances of the individual case. (*People v. Carmony, supra*, 33 Cal.4th at p. 378.) It is not sufficient to show that reasonable people might disagree about whether to strike a prior conviction. (*Id.* at p. 377.) “[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Ibid.*)

In this case, the court was well aware of its discretion under section 1385 and recited the relevant factors set forth in *Williams*. It found defendant did not fall outside the spirit of the three strikes scheme and denied his request to dismiss the prior strikes. We cannot say the court abused its discretion in denying defendant's request and imposing the third strike sentence in this case.

III. The Great Bodily Injury Enhancement

Defendant next argues the jury's finding on the great bodily injury enhancement must be reversed for insufficient evidence because the prosecution failed to prove

defendant “personally” inflicted great bodily injury on Gomez. Defendant asserts the evidence showed that Rivas and Romo inflicted the serious injuries on Gomez, and he also could have been injured by one of the nonlethal rounds fired into the yard.

A. Great Bodily Injury

The jury found true the section 12022.7, subdivision (a) enhancement, that states:

“Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years.”

“Great bodily injury ‘means a significant or substantial physical injury.’

[Citations.]” (*People v. Cross, supra*, 45 Cal.4th at pp. 63–64, fn. omitted.) “Great bodily injury is defined as ‘a significant or substantial physical injury,’ but it need not be permanent or cause lasting bodily damage. [Citations.]” (*People v. Saez* (2015) 237 Cal.App.4th 1177, 1188.)

Whether a defendant personally inflicted great bodily injury is a factual question for the jury that will be affirmed if supported by substantial evidence. (*People v. Cross, supra*, 45 Cal.4th at p. 64; *People v. Saez, supra*, 237 Cal.App.4th at p. 1189.) To evaluate a claim of insufficient evidence, “ ‘we review the whole record to determine whether ... [there is] substantial evidence to support the verdict ... such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.]’ ” (*People v. Manibusan* (2013) 58 Cal.4th 40, 87; *People v. Slough* (2017) 11 Cal.App.5th 419, 423.)

“ ‘ “If there is sufficient evidence to sustain the jury’s finding of great bodily injury, we are bound to accept it, even though the circumstances might reasonably be reconciled with a contrary finding.” ’ [Citation.]” (*People v. Escobar* (1992) 3 Cal.4th 740, 750, fn. omitted.)

B. Personal Infliction

“[T]he meaning of the statutory requirement that the defendant *personally inflict* the injury does not differ from its nonlegal meaning. Commonly understood, the phrase ‘personally inflicts’ means that someone ‘in person’ [citation], that is, directly and not through an intermediary, ‘cause[s] something (damaging or painful) to be endured’ [citation].” (*People v. Cross, supra*, 45 Cal.4th at p. 68, italics in original.) “Certainly, ‘for the [great bodily injury] enhancement to apply, the defendant must be the *direct*, rather than proximate, cause of the victim’s injuries.’ [Citation.]” (*People v. Martinez* (2014) 226 Cal.App.4th 1169, 1184–1185, original italics.)

“Accordingly, ‘one who merely aids, abets, or directs another to inflict the physical injury is not subject to the enhanced penalty of section 12022.7.’ [Citation.]” (*People v. Slough, supra*, 11 Cal.App.5th at p. 423.) In *People v. Cole* (1982) 31 Cal.3d 568 (*Cole*), the defendant and an accomplice broke into a house and robbed the victim. When the victim resisted, the defendant told his accomplice to kill the victim. The accomplice beat the victim. The defendant did not strike the victim but held a gun on him and prevented him from escaping. The victim survived. The defendant was convicted of multiple felonies along with a great bodily injury enhancement. (*Id.* at pp. 571–572.) *Cole* reversed the great bodily injury enhancement and held that based on the statutory language, it only applied “to a person who himself inflicts the injury.” (*Id.* at p. 572.) *Cole* held that “the Legislature intended to impose an additional penalty for causing great bodily injury only on those principals who perform the act that directly inflicts the injury, and that one who merely aids, abets, or directs another to inflict the physical injury is not subject to the enhanced penalty of section 12022.7.” (*Id.* at p. 571.) “Expansion of the penalty to include those who merely aid in the infliction of the injury would frustrate the intent of the Legislature to impose the enhancement only on those who ‘personally’ inflict great bodily injury.” (*Id.* at p. 573.)

As a separate matter, however, “[m]ore than one person may be found to have directly participated in inflicting a single injury” to support the great bodily injury enhancement. (*People v. Martinez, supra*, 226 Cal.App.4th at p. 1185.) In addition, a defendant is the direct cause of the injury if the victim is injured during “the volitional act of struggling and attempting to pull away” from the defendant because “[n]either the accidental nature of the injury, nor the fact that it takes two to struggle, absolves defendant of responsibility for personally inflicting [great bodily injury] on the victim.” (*People v. Elder* (2014) 227 Cal.App.4th 411, 421.)

In *People v. Modiri* (2006) 39 Cal.4th 481 (*Modiri*), the court addressed the meaning of the identical phrase “personally inflicts great bodily injury” as used in section 1192.7, subdivision (c)(8), when a victim is injured in the course of a group beating. The court held a defendant could be found to have personally inflicted the victim’s injuries if the defendant “joins others in actually beating and harming the victim, and where the precise manner in which he contributes to the victim’s injuries cannot be measured or ascertained.” (*Modiri, supra*, 39 Cal.4th at p. 495.)

“The term ‘personally,’ which modifies ‘inflicts’ in section 1192.7(c)(8), does not mean exclusive here. This language refers to an act performed ‘in person,’ and involving ‘the actual or immediate presence or action of the individual person himself (as opposed to a substitute, deputy, messenger, etc).’ [Citation.] Such conduct is ‘[c]arried on or subsisting between individual persons directly.’ [Citations.] *Framed this way, the requisite force must be one-to-one, but does not foreclose participation by others.*

“In short, nothing in the terms ‘personally’ or ‘inflicts,’ when used in conjunction with ‘great bodily injury’ in section 1192.7(c)(8), necessarily implies that the defendant must act alone in causing the victim’s injuries. Nor is this terminology inconsistent with a group melee in which it cannot be determined which assailant, weapon, or blow had the prohibited effect. By its own terms, the statute calls for the defendant to administer a blow or other force to the victim, for the defendant to do so directly rather than through an intermediary, and for the victim to suffer great bodily injury as a result.” (*Id.* at p. 493, italics added.)

Modiri held that “nothing in *Cole* precludes a person from receiving enhanced sentencing treatment where he joins others in actually beating and harming the victim, and where the precise manner in which he contributes to the victim’s injuries cannot be measured or ascertained.” (*Modiri, supra*, 39 Cal.4th at p. 495.)

“For 20 years, courts have upheld personal-infliction findings where the defendant physically joins a group attack, and directly applies force to the victim sufficient to inflict, or contribute to the infliction of, great bodily harm. Consistent with the statutory language and the manner in which it has been judicially construed, the defendant need not be the sole or definite cause of a specific injury. [T]hese group beating principles have been accepted by the Legislature.... A contrary approach would mean that those who perpetrate mob violence and inflict gratuitous injury would often evade enhanced punishment.” (*Id.* at p. 486.)

Modiri acknowledged that in group beating cases, “the evidence is often conflicting or unclear as to which assailant caused particular injuries in whole or part. [T]hose who participate directly and substantially in a group beating should not be immune from a personal-infliction finding for the sole reason that the resulting confusion prevents a showing or determination of this kind. [¶] [The] contrary view would mean that ‘[o]nly those whose foot could be traced to a particular kick, whose fist could be patterned to a certain blow or whose weapon could be aligned with a visible injury would be punished. The more severe the beating, the more difficult would be the tracing of culpability.’ [Citation.] Under such circumstances, all participants in a group attack who personally caused or contributed to the infliction of harm could conceivably escape enhanced punishment. Given the apparent goal of deterring and punishing gratuitous violence, the drafters of sections 1192.7(c)(8) and 12022.7(a) could not have intended that result.” (*Modiri, supra*, 39 Cal.4th at p. 497.)

C. Analysis

There is substantial evidence to support the jury’s finding that defendant personally inflicted great bodily injury on Gomez. The correctional officers testified that

defendant joined the assault within seconds, and continually punched and kicked Gomez until the officers finally regained control of the yard.

Defendant raises several arguments to assert the great bodily injury enhancement must be reversed. First, defendant argues Romo and Rivas performed an unprovoked attack on Inmate Gomez while defendant was still playing handball. Defendant claims he “ran toward the fight to assist Inmate Gomez who was being attacked by multiple parties including Inmate Soto. Although never charged, Inmate Soto was found with injuries including blood on his hands and an injury from [a nonlethal round].” While defendant did not testify at trial, defense counsel sought to raise these claims during cross-examination of the correctional officers – that defendant tried to help Gomez and Soto was one of the aggressors in the assault. However, the officers testified that defendant never tried to assist Gomez and instead started punching and kicking Gomez with the same intensity as Romo and Rivas, he continued the assault when Gomez fell, and he kept beating Gomez even after defendant was hit by the nonlethal rounds. The officers also testified that Soto was not involved in the assault, and he was injured by one of the “unaccounted for” rounds that was fired into the yard.

Defendant next asserts the evidence showed Romo and Rivas inflicted the severe injuries to Gomez before defendant joined the altercation. Defendant claims Gomez had been “violently punched on the side of the head and was kicked and punched while down before [defendant] reached the altercation. The main injury, the fracture to the orbital bone, occurred prior to [defendant’s] arrival.” As anticipated in *Modiri*, there is no evidence as to exactly when or how Gomez suffered the orbital fracture to his left eye, but there is overwhelming evidence that defendant willingly joined the assault within seconds after it started and punched and kicked Gomez with the same intensity as used by Romo and Rivas.

Finally, defendant asserts that Dr. Cusator testified it was possible Gomez’s injuries were caused by a nonlethal round hitting “the right side of Inmate Gomez’ head

and causing a blowout fracture to the left side of his eye socket. Aside from showing whether [defendant] caused any of the injuries to Inmate Gomez, the state failed to prove if it was a person in the altercation or an object like [a nonlethal round] that caused the injury to Inmate Gomez. Since the [nonlethal round] could have caused the injury, the prosecution failed to prove [defendant] personally inflicted great bodily injury.” In response to a series of questions, Dr. Cusator testified that if Gomez had been hit on the right side of his face by a nonlethal round, he could have suffered the blowout fracture on the left side if his head hit something in reaction to the blow from the right side, but he would have expected to see similar trauma on the right and left sides. Dr. Cusator ruled out this possibility because Gomez did not have the same type of trauma on the right side.

Lieutenant Gaworski testified that he could not rule out whether the abrasions around Gomez’s right eye were caused by one of the nonlethal rounds. However, Gaworski and the other witnesses testified the injuries to Gomez’s left eye and the orbital fracture were not caused by the nonlethal rounds and were instead consistent with the beating.

We find there is substantial evidence to support the jury’s finding that defendant personally inflicted great bodily injury.

IV. The Prior Serious Felony Enhancement

Defendant was sentenced to 25 years to life plus three years for the great bodily injury enhancement and five years for a prior serious felony enhancement. The parties agree the matter must be remanded for the court to determine whether to exercise its discretion to dismiss the prior serious felony enhancement pursuant to newly-enacted legislation. We will briefly review the sentencing hearings in this case.

A. Background

The amended information alleged defendant had two prior serious felony enhancements (§ 667, subd. (a)(1)) and two prior strike convictions, based on defendant’s violation of section 215, subdivision (a), carjacking, and violation of section 211, second

degree robbery, and that both convictions occurred on June 5, 2009 in Riverside County Superior Court case No. 5WF026932.

After defendant was convicted, the court found the prior conviction allegations true.

On June 3, 2016, the court conducted the sentencing hearing and denied defendant's request to dismiss the prior strike convictions. The court sentenced defendant to the third strike term of 25 years to life plus three years for the great bodily injury enhancement. Over the prosecutor's objections, the court declined to impose any terms for the prior serious felony enhancements and found that "in the long run, as a practical matter," the additional terms did not "really make that much difference."

On June 6, 2016, the court recalled the matter for resentencing on its own motion. On July 8, 2016, the court conducted another sentencing hearing, denied defendant's renewed request to dismiss the prior strike convictions, and again sentenced defendant to 25 years to life for count 1, plus three years for the great bodily injury enhancement. The court imposed an additional five-year consecutive term for one section 667, subdivision (a) prior serious felony enhancement, and acknowledged it had erroneously failed to do so at the first sentencing hearing. The court stated it would only impose one enhancement because the two prior felonies had not been brought and tried separately as required by section 667, subdivision (a).

B. SB 1393

Section 667, subdivision (a)(1) states that a five-year enhancement shall be imposed for each prior serious felony conviction "on charges brought and tried separately." The People have not challenged the court's imposition of one five-year enhancement and the finding that defendant's two prior serious felony convictions were not brought and tried separately. (See, e.g., *In re Harris* (1989) 49 Cal.3d 131, 136; *People v. Deay* (1987) 194 Cal.App.3d 280, 286.)

At the time of both sentencing hearings, however, the court was statutorily required to impose the section 667, subdivision (a) enhancement and did not have any authority to strike or dismiss it. (§ 667, former subd. (a)(1); § 1385, former subd. (b).)

Effective January 1, 2019, section 667 and section 1385 were amended by Senate Bill No. 1393, to remove the prohibitions on striking a prior serious felony enhancement. (See Stats. 2018, ch. 1013, §§ 1–2.) The new statutes apply retroactively to all cases that are not yet final. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.)

We note that at the first sentencing hearing, the court declined to impose any terms for the two section 667, subdivision (a) enhancements and found that “in the long run, as a practical matter,” the additional terms did not “really make that much difference.” As explained above, the court subsequently recalled the sentence and imposed an additional term of five years for the section 667, subdivision (a) prior serious felony enhancement, and acknowledged the term was mandatory and could not be stricken.

Therefore, on remand, the court shall consider whether to strike the prior serious felony enhancement in furtherance of justice. We do not find that the court must strike the enhancement, but only that the court must consider whether to exercise its discretion in furtherance of justice pursuant to the newly-enacted statutory provisions.

DISPOSITION

The matter must be remanded for the court to determine whether to exercise its discretion to dismiss the prior serious felony enhancement. In all other respects, the judgment is affirmed.

POOCHIGIAN, Acting P.J.

WE CONCUR:

DETJEN, J.

DESANTOS, J.